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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: DEC 20 2007

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Permanent Residence Pursuant to Section 1 of the Cuban Adjustment Act of November 2, 1966 (P.L. 89-732)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Texas Service Center, who certified her decision to the Administrative Appeals Office (AAO). The Director's decision will be withdrawn and the matter returned to the Director for further consideration.

The applicant is a native and citizen of Cuba who on November 30, 2006 applied to have her immigration status adjusted to that of an alien lawfully admitted for permanent residence under section 1 of the Cuban Adjustment Act (CAA) of November 2, 1966. The record also reflects that the applicant was admitted to the United States on September 29, 2005, as a K-1 nonimmigrant, based on an approved Form I-129F petition filed by the applicant's fiancé, a United States citizen. The CAA provides, in pertinent part:

[T]he status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least one year, may be adjusted by the Attorney General, (now the Secretary of Homeland Security, (Secretary)), in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence. The provisions of this Act shall be applicable to the spouse and child of any alien described in this subsection, regardless of their citizenship and place of birth, who are residing with such alien in the United States.

The regulation at 8 C.F.R. § 245.1(i) states in pertinent part:

- (c) Ineligible Aliens. The following categories of aliens are ineligible to apply for adjustment of status to permanent residence under section 245 of the Act:
- (6) Any alien admitted to the United States as a nonimmigrant defined in section 101(a)(15)(K) of the Act, unless:
 - (i) In the case of a K-1 fiancée(e) under section 101(a)(15)(K)(i) of the Act or the K-2 child of a fiancée(e) under section 101(a)(15)(K)(iii) of the Act, the alien is applying for adjustment of status based upon the marriage of the K-1 fiancée(e) which was contracted within 90 days of entry with the United States citizen who filed a petition on behalf of the K-1 fiancée(e) pursuant to § 214.2(k) of this chapter.

The Director determined that although the applicant is a native of Cuba, she was admitted as a K-1 nonimmigrant, and her adjustment to lawful permanent resident status is thus dictated by the regulation at 8 C.F.R. § 245.1(i). The Director also concluded that the applicant had not married the individual who had filed the Form I-129F petition on her behalf. *See Director's decision*, dated March 14, 2007. Accordingly, the Director denied the application for adjustment of status under the CAA. *Id.*

The AAO notes that the regulatory restriction on the adjustment of K-1 aliens found at 8 C.F.R. § 245.1(i) is imposed in the context of adjustments under section 245 of the Act. The applicant in the present matter, however, is not seeking adjustment under section 245 of the Act, but under the CAA and is, therefore, not subject to the restrictions identified by the Director. In discussing the requirement that a CAA applicant have been inspected and admitted or paroled into the United States after January 1, 1959, Chapter 23.11(b)(2) of the Citizenship and Immigration Services' Adjudicator's Field Manual states that:

Any inspection and admission or parole, **regardless of classification of admission** [emphasis added] . . . meets this requirement. See *Matter of Alvarez-Riera*, 12 I&N Dec. 112 (BIA 1967); *Matter of Rodriguez*, 12 I&N Dec. 549 (R.C. 1967); *Matter of Martinez-Monteagudo*, 12 I&N Dec. 688 (R.C. 1968).

Accordingly, the AAO finds that the applicant's K-1 admission to the United States on September 29, 2005 does not prevent her from benefiting from the provisions of the CAA.

The AAO notes that the Director did not make any findings concerning whether the applicant is, otherwise, eligible for adjustment under the provisions of the CAA. Nor did the Director address whether the applicant merits a favorable exercise of discretion. Accordingly, the AAO will return the application to the Director so that she may consider these issues prior to the issuance of a new decision.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the applicant to establish that she is eligible for adjustment of status. She has met that burden. The decision of the Director to deny the application will be withdrawn and the matter will be returned to the Director for further consideration consistent with the foregoing discussion.

ORDER: The Director's decision is withdrawn. The matter is returned to the Director for further consideration consistent with the foregoing discussion.